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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 597

UNITED STATES OF AMERICA, *Appellant*,

v.

UNITED SHOE MACHINERY CORPORATION

On Appeal From the United States District Court for the District of Massachusetts

BRIEF OF THE NATIONAL FOOTWEAR MANUFACTURERS ASSOCIATION INC., AND THE NEW ENGLAND FOOTWEAR ASSOCIATION INC., AS AMICUS CURIAE

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STATEMENT OF INTEREST

The National Footwear Manufacturers Association, Inc. and the New England Footwear Association, Inc. ("*amici*") respectfully file this brief as *amici curiae* because of the concern of their members that disposi-

tion of this appeal as asked by the government would set in motion proceedings whose ultimate result could be injurious to the economic condition of the shoe manufacturing industry. Written consent of all parties to file a brief was given under Rule 42(2).

The National Footwear Manufacturers Association is a trade association incorporated in 1922 under the laws of the state of New York with principal offices at 342 Madison Avenue, New York, New York, representing 245 footwear manufacturers operating 400 factories located throughout the United States. The New England Footwear Association is a trade association incorporated in 1871 under the laws of the state of Massachusetts, having its principal offices at 4574 Prudential Building, Boston, Massachusetts, and representing footwear manufacturers operating 250 factories throughout the New England states. The associations support affirmance of the decision of the lower court, 266 F. Supp. 328 (D. Mass. 1967), JS App. A 25).

By operation of paragraph 9 of the district court's 1953 decree, both associations first entered the proceeding as *amici curiae.* Both associations, upon specific action of their respective governing bodies, were directed to participate in the C Day proceedings, to the extent permitted by the district court, to advocate continuance of the decree in its present form, and to oppose both the petition of United and that of the government for modification thereof. Accordingly, *amici* by leave of the district court took an active part throughout the C Day proceedings. The district court commented upon the degree to which *amici's* participation was useful to it (266 F. Supp. at 335, JS App. A 38).

The associations on whose behalf this request is made represent the substantial majority of shoe manufacturing companies and factories in the United States and, therefore, speak for the principal domestic customers of appellee. The availability of modern efficient shoe machinery is basic to the operation of the shoe manufacturing industry, and accordingly, the industry is vitally concerned with and would be immediately and directly affected by any government action which might effect or set in motion procedures leading to a structural realignment of a supplier industry. The district court recognized the interest of the shoe manufacturing industry by referring to it in the C Day opinion as, ". . . among the chief intended beneficiaries of this Court's decree . . ." (266 F. Supp. at 335, JS App. A 38). Our deep interest in this proceeding is confirmed by the government in its cognizance that any relief in the nature of reorganization should not work hardship on the American shoe manufacturing industry (Gov't. br. 49).

The members of *amici* have been uniquely situated to observe the day-to-day functioning of the decree over the past ten years. Their relationship with United during this period has often been marked by vigorous dispute respecting interpretations of the provisions of the decree. The proper machinery lease-sale conversion ratio to be established under paragraph 9 of the decree was hotly contested by representatives of *amici* and United with the result that the aggregate sale value was substantially decreased and conversion purchases became extremely attractive to shoe manufacturers.[1] *Amici* strenuously opposed United's petition

[1] See Kaysen, *United States* v. *United Shoe Machinery Corporation*, 311-321 (1956) [hereinafter referred to as Kaysen].

for modification throughout the C Day proceeding. We are equally strenuous in our opposition to the government's efforts to modify this decree.

Amici have concluded that the decree is effectively working in continuing to generate a smooth transition toward a substantially more competitive shoe machinery market and toward the dissipation of United's unlawful market power. Today the shoe manufacturing industry has benefitted from increasing competitive alternatives in every important sector of shoe factory demand. Equally significant, these sectors are being served by a large number of suppliers who are entering the shoe machinery industry at an increasing rate. The progress made under the decree in the past decade is remarkable in light of United's pre-decree market position and the essential characteristics of the shoe machinery market.

In the opinion of the shoe manufacturing members of *amici,* economic conditions in the shoe industry and competition generally would be best served by continuing the decree in its present form so that its full erosive force on the structure of the shoe machinery market might be exerted. The government asks this Court, in essence, to disrupt the operation of the decree and initiate steps whose only proper result from the government's viewpoint would be dissolution or divestiture. As is explained in this brief, the shoe manufacturing industry is firmly of the opinion that such surgical relief is not only unnecessary to cure the evils which resulted from unlawful monopolization, but would create serious hardship for shoe manufacturers.

SUMMARY OF ARGUMENT

I

The district court properly considered the petitions for modification. The context and the particular nature of the decree must not be overlooked. For more than fifty years, since United's formation in 1899, and through three separate challenges by the government,[2] its share of the shoe machinery industry and relationship to the shoe industry had been essentially undisturbed until the present decree was entered. The 1953 decree constituted an explicit design to accomplish the recognized objectives of depriving defendant of the fruits of monopolization and dispersing its unlawful market power (110 F. Supp. at 347) while at the same time avoiding irreversible steps, confiscatory to defendant and tending to injure, rather than promote, more salutary economic conditions in the shoe manufacturing industry (*Id.* at 348).

The 1966 (C Day) review was called for by the decree to assure that the relationship between expectancy and event would be subject to review. In that hearing, the court received a cascade of statistical and other evidence tendered by the parties. The government's assertion that the district court improperly applied *United States* v. *Swift & Co.*, 286 U.S. 106, to government-sought modification of antitrust decrees as well as its implication that its opportunity to present full proof was arbitrarily truncated overlooks the fact that Judge Wyzanski, while citing and expressing some reliance on this landmark opinion, in fact delved into

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[2] *United States* v. *Winslow*, 227 U.S. 202; *United States* v. *United Shoe Machinery Co. of New Jersey*, 247 U.S. 32; *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451.

the parties' extensive evidential offerings and excavated numerous positive findings demonstrating, we submit, that the decree was operating extremely well and modification—entirely apart from any *Swift* doctrine—was simply not warranted. (Pt. I, *infra*).

II

The district court's conclusion that the decree has stimulated a substantial, albeit gradual, erosion of United's pre-decree market power is correct in the judgment of *amici,* whose members have observed the operation of the decree and the performance of the shoe machinery market on a daily basis for the past decade. The highest supportable measure of a 1963 United "market share" of approximately 62 percent (based on revenues), compared with the estimated market share in 1953 (1947-1949) of between 75 and 90 percent, ". . . probably 85 percent" (110 F. Supp. at 339), represents a startling decline of its market occupancy in view of the fact that substantial revenues are necessarily attributable to machines leased even before entry of the decree. This evidence would affirmatively demonstrate the effectiveness of the decree even if other, more significant, gauges of market share and competitive vitality were not present. In fact other record data relied upon by the district court strongly support the conclusion that United's position across the entire shoe machinery market has slipped to approximately 50 percent since the decree was entered and United's machines outstanding on lease in shoe factories, when validly projected, represents only 17 percent of all shoe machines in position in shoe manufacturing plants.

United confronts competition in all phases of shoe factory operations where competition might have rea-

sonably been expected to develop. The absence of the barriers to entry which were, in large, responsible for United's monopoly poistion, will cause this erosion of its market position to continue and new competition will be attracted to those areas where it might flourish, just as new competition has developed and succeeded under the operation of the decree to date. The significance of this is highlighted by a steady trend in the shoe industry away from those machine lines where United's position has historically been most entrenched to those where it faces extremely vigorous competition. Since the correctness of the district court's findings is not challenged, the only tenable objection of the government is that the decree has not worked as rapidly as it would like. But the effect of the decree has been as great as could be legitimately anticipated in the context of such market factors as the unattractiveness of the shoe machinery industry, the basic stability and slow overall growth of the shoe manufacturing industry, the disincentive to entry in the numerous machine lines which offer an opportunity for less than six transactions per year and the substantial ownership in shoe machinery by shoe manufactures achieved by virtue of conversion sales in the first effective year of the decree. (Pt. II, *infra*).

III

In the same spirit that the government "tentatively suggests" avenues of divestiture, it is appropriate that the *amici* identify the broad bases for their concern that any relief of this nature would operate to their disadvantage and that of competition generally. Any present effort to divest assets, facilities and personnel from United's Beverly, Massachusetts factory would

involve the same physical impediments, uncertainties and possible losses in industry efficiency which were noted by the district court in 1953. Alternative divestiture techniques, even if available, would equally lead to unfortunate results.

Any consideration of a remedy so drastic as dissolution or divestiture must take into account the competitive forces which have appeared in the market under the decree. Since 1953, a large and steadily increasing number of competitors have entered the shoe machinery market and pre-existing competitors of United have enjoyed rapid growth. As a result, there is no question under the decree of the capacity for limited line companies to enter and thrive in areas of substantial shoe factory demand. The maintenance of market conditions which will continue to permit the appearance and success of such companies is highly desirable from the viewpoint of shoe manufacturers. The structure of the shoe machinery market is such that even if it were possible to create two or more viable full-line companies, they might occupy the whole of the market and alter irrevocably the characteristics of competition in the shoe machinery market, and the shoe industry would be ill-served by the elimination of competitive opportunities for the many limited line companies.

There are sectors of the machinery market where shoe factory demand is relatively slow, where annual transactions are few and which are not and will not be especially attractive to new entry. Here particularly the possible dismemberment of United holds serious threats for the shoe manufacturers. Historically, United has been an important source for research and development in shoe machinery manufacturing. In these sectors of the market, United remains the most

important source of machinery research and development. In the face of dismemberment, United's incentive to continue shoe machinery research at its present level, much less to increase it, could, in the opinion of *amici,* be severely diminished. United has already diversified to a substantial extent into many other markets, and we are concerned that the government's proposed disposition of this proceeding will greatly accelerate this trend to the detriment of the shoe industry. United has also provided full service for these thin markets. Acceptance of a full-line position for United may permit a spreading of costs which makes available continued offerings at acceptable lease and sale prices in slow turnover machine lines, and inhibits the possible abandonment of leasing, or both leasing and sale in some of these markets.

ARGUMENT

I. The Standards and Scope Applied by the District Court in Reviewing and Continuing the Decree Were Entirely Consistent With Antitrust Principles and Precedents.

It is axiomatic that a paramount test of the effectiveness of an action based on monopolization is whether the relief imposed deprives the monopolist of the fruits of monopolization and disperses the unlawful monopoly power condemned by section 2 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 USC § 2 (1964). The government thus correctly cites a line of decisions by this Court commencing with *United States* v. *United States Gypsum Co.,* 340 U.S. 76, to the effect that relief may be the most important aspect of an antitrust case.

At the same time, however, antitrust remedies have been described as essentially predictive and dependent

to a great extent on the history and nature of the market involved.[3] Irreversible remedial sanctions, such as dissolution, should be avoided where there is a danger that what remains thereafter may be less consistent with antitrust goals than could be achieved otherwise.[4] This approach dissuades the use of mechanical formulae in determining relief, whether on first adjudication or on review. It comprehends, rather, an intensive analysis of competition in the context of existing industry conditions and teaches that generalizations conducive to judging remedial sanctions in one market are not transportable into another.

It is, therefore, important to gauge the effectiveness of the decree herein against the context of the shoe machinery industry to determine whether the decree is operating, as intended, to eliminate immediately United's unlawful conduct and to dissipate United's unlawfully-acquired market power as fully and expeditiously as is feasible and desirable. We submit that the district court undertook precisely this sort of review.

Created by amalgation of several shoe machinery companies in 1899, United almost instantaneously occupied aproximately 80 percent of the relevant market.[5] This position was solidified by a lease-only policy and the establishment of lease provisions which, in many respects, effectively bound the shoe manufacturing industry to United. This position and the ties to the

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[3] Professor Kaysen, commenting on the main case, indicated the difficulty in assigning any precise time span to assessment of effective relief in this case. Kaysen, at 271-272 (1956).

[4] Markham, *An Alternative Approach to the Concept of Workable Competition,* XL American Econ. Rev. No. 3 (June, 1950).

[5] See Whitney, *Antitrust Policies,* 120 (1958).

shoe industry were sustained for more than 50 years, despite three prior government attacks,[6] until the 1953 decision of the district court, which was affirmed by this Court in 1954 (347 U.S. 521).

For a variety of reasons, only one of which was the impracticality presented by the location of all of United's shoe machinery manufacturing facilities and personnel in one plant, the district court declined to put into effect any plan of dissolution but chose instead relief designed to terminate forthwith the practices whereby United had monopolized the market and to set in motion a substantial force for the creation of effective competition (110 F. Supp. at 349-350). In doing so, the Court was expressly aware of the limitations, *ex officio,* on judges' ability to forecast the results of remedial economic sanctions and that dissolution would be essentially irreversible should it turn out to have been erroneously imposed (110 F. Supp. at 347-348). Having selected a form of relief which was designed to eliminate the pre-decree barriers to increased competition, to open the market to new entry and to encourage the growth of smaller shoe machinery manufacturers, the district court prudently insured by paragraph 18 of its decree that the effectiveness of the decree and the condition of the market would be brought before it after a reasonable period of time.

Thus, the decree when it was entered was consistent with antitrust objectives in that by eradicating the restrictive lease provisions which bound the shoe industry to United, abolishing the "lease only" system and requiring licensing of certain patents, it extirpated unlawful practices and deprived United of many of

[6] See note 2, *supra.*

"the benefits of the illegal conduct",[7] (see *United States* v. *Grinnell Corp.*, 384 U.S. 565, 577), and launched the force for dispersal of monopoly power.

In accomplishing the review called for by paragraph 18 of the decree, the district court made detailed findings covering virtually every aspect of the changes which have occurred in the shoe machinery market since 1955. Specifically, the district court found, *inter alia,* (see II, *infra*) that United's market share computed on the basis of current revenues declined from 85 to 62 percent and that United's share of current machine shipments was close to 50 percent. The Court found further that United's shoe machinery lease and sale volume declined from $32 million in 1955 to $24 million in 1963 while its 12 most important competitors doubled their gross revenues during the same period, and that the before tax earnings of United's Shoe Industry Group, exclusive of conversion sales, declined from $11 million to $6 million over the period of the decree. It also found that of the machines in position in shoe factories only 54 percent were of United origin and only 47 percent had been leased or bought from United and only 17 percent were on lease from United in 1963, that United has faced important competition from an active second hand market, that entry of shoe machine manufacturers had occurred since the decree, and that there was a declining significance to shoe manufacturers of the sole categories using machine types where United's position was most substantial. Finally, the Court found that United was without significant competition in certain sectors of the shoe machinery in-

[7] United was further immediately deprived of the fruits of monopolization by being required to divest itself of certain shoe factory supply operations. 110 F. Supp. at 353.

dustry, principally in those areas where the markets were thin and characterized by slow turnover.

On the basis of these findings, the district court reached the ultimate conclusion that, ". . . the 1953 decree has operated in the manner and with the effect intended" (266 F.Supp. at 334, JS App. A 36). The nature of the inquiry undertaken by the district court was whether the decree is substantially effecting its expressly stated objective to "gradually diminish" the magnetic hold on the market formerly enjoyed by United (110 F. Supp. at 350). Upon an exhaustive study of present economic conditions in the market, the district court held that the decree was continuing to exert this force and concluded that it should not be disturbed. This standard of review is entirely consistent with antitrust principles and precedents and neither party can properly complain of its inadequacy. While the government charges application of an erroneous standard, the result below was dictated by a clear evidence of the steadily erosive impact of the decree and the inability of the government to contradict this evidence under an entirely proper standard.

This standard is not modified by the introduction of the term "workable competition".[8] As the district court stated, the intent of this phrase was to signify the objective of a gradual erosion of United's market power. The test of the decree's effectiveness, therefore, as seen by the district court, was whether it is continuing to create more competitive conditions in the

[8] The inability to assign a definitive legal meaning to the term is conceded by the government (Gov't. br. 43). See also a discussion of the variety of meanings which might be accorded workable competition in Kaysen and Turner, *Antitrust Policy*, 81, 82, (1959). [Hereinafter referred to as Kaysen and Turner.]

shoe machinery market consistent with the objectives of the Sherman Act.

In reviewing the decree under this standard, the district court adopted a pre-trial order entirely consonant with the standard itself. The district court first addressed the threshold question: whether any modification whatever would be appropriate in light of the operation of the decree. Both parties and *amici* were afforded the opportunity to submit proposed pre-trial orders for the consideration of the court. The court properly selected those categories of information, similar in many respects to that upon which it relied in 1953, which would best enable it to assess the effectiveness of the decree during its tenure in establishing competition in the shoe machinery market. The court in this first inquiry decided not to accept evidence as to a suggested program for divestiture. This determination is perfectly in accord with sound judicial procedure in ascertaining first whether any relief is called for and only upon reaching an affirmative conclusion as to the need for further relief to hear detailed evidence as to the terms thereof. Any other approach would, of course, absorb the court's time in exposure to a morass of information which might be altogether unnecessary.

The government was not in fact foreclosed by operation of the pre-trial order of which it complains (Govt. br. 12-14, 47) from introducing any substantial evidence it proffered to show why modification of the decree is necessary. Moreover, the government has not suggested any evidence that might have been proffered but for the pre-trial order.

In the final analysis, the standard actually employed by the district court differs from that urged by the

government principally with regard to the time within which relief consonant with antitrust goals must be terminally accomplished. Despite the government's contrary implication (Govt. br. 42-44), there is nothing either in the district court's 1953 decision and order or in underlying antitrust authorities which suggests any objective other than a gradual restoration of workable competition to the shoe machinery market and, equally important, there is likewise no suggestion that such restoration be accomplished within any fixed, prescribed time period. The refusal of the court to set a definite date by which the decree must be fully effective or be modified to provide for more drastic relief is fully in accord with antitrust principles. Rather, given the limitations of trial judges, *ex officio*, as economic forecasters (110 F. Supp. at 347, 348) the imposition of rigid deadlines would be wholly inappropriate. It is enough that the decree is continuously and substantially working to remove the effects of unlawful monopolization from the market place, so that this goal might be realized within a reasonable period of time in light of the character of the industry involved.

The government asserts that the provisions of paragraph 18 of the decree establish a time limit within which it must be fully effective (Govt. br. 42-44). The district court has unequivocally stated that such was not the intent of this provision, but that it wanted to be sure of the opportunity to review the decree's effect in eroding United's unlawful market power and serving its express objective of establishing workable competition (266 F. Supp. at 334, JS App. A. 36, 37). The plain language of paragraph 18 bears out this interpretation of its meaning. Review is evoked to determine the effect of the decree "in establishing" work-

able competition, not to assess whether workable competition had in fact "been established" by C Day. The district court plainly identified this objective through its emphasis on gradual diminishment of United's market power in its 1953 opinion (110 F. Supp. at 350). Had the decree been intended to establish a time certain for the evaluation of its ultimate impact, it could easily have been precisely drafted to provide therefor.[9] In this light, there can be no valid claim of surprise as to the district court's interpretation of paragraph 18.

Certainly, if the decree were not having any substantial effect in moving the market toward more effective competition, now or in the future, modification involving more drastic remedies might be appropriate. But the district court found that the decree is having this substantial effect, and, in the opinion of *amici,* it should be allowed to continue to exert its effect as presently constituted. At the same time, any implication that if the decree is not modified now, the government will be forever deprived of the opportunity to seek modification, regardless of subsequent economic developments is without substance. Jurisdiction of the cause is permanently retained by the district court and a petition for modification on proper grounds and supported by substantial evidence might be filed by either party at any time.

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[9] Provision for further relief in the event that certain contingencies have or have not occurred within fixed time spans are not unique in antitrust decrees. See, e.g., such provisions in United States v. International Harvester Co. (D. Minn. 1918), quoted in United States v. International Harvester Co., 274 U.S. 693, 697; and more recently in United States v. General Motors Corp., 1965 Trade Cas. ¶ 81,802 (E.D.Mich. 1965).

The government devotes substantial attention to its argument that the district court erred in applying the principles laid down in *United States* v. *Swift & Co.*, 286 U.S. 106, to the government when it seeks modification of an antitrust decree (Govt. br. 34-41). *Swift* is, of course, the landmark decision of this Court regarding modification of antitrust decrees, and it would probably be as difficult to find a judicial decision on this subject which did not cite *Swift* as it would to find a merger decision which did not cite *Brown Shoe Co.* v. *United States*, 37 U.S. 294. The fact remains that *Swift* has been consistently followed by the courts, *Morse-Starrett Products Co.* v. *Staccone*, 205 F. 2d 244 (9th Cir. 1953); *Bigelow* v. *Twentieth Century-Fox Film Corp.*, 183 F. 2d 60 (7th Cir. 1950); *United States* v. *Lucky Lager Brewing Co. of San Francisco*, 209 F. Supp. 665 (D. Utah 1962), and the government fails to identify any authority for its proposition that the government is entitled to a preferred position.

More important, however, the district court, despite its citation of *Swift*, embarked on a far-reaching review which was not confined by *Swift* criteria. As described above, the district court searched and weighed all aspects of the shoe machinery market and affirmatively concluded that the decree is steadily creating a substantially more competitive climate in the shoe machinery industry. The findings of the district court and its affirmative conclusion as to the present effectiveness of the decree sharply contrast from the essentially negative findings and conclusion which might have sufficed had *Swift* been accorded exclusive reliance.

II. The Decree Is Working in the Manner Anticipated When It Was Entered To Create Workable Competition and To Deprive United of the Benefits of Monopolization.

It is apparent that the government does not seriously contest the findings of the district court. There is no claim that these findings were clearly erroneous or were otherwise fatally defective under any other standard. On this basis of the evidence, the district court perceived a clear and fundamental portrayal of changed economic conditions in the shoe machinery industry since entry of the decree. Its findings on this basis led to the ultimate conclusion that the decree is exerting a rolling force in thrusting the shoe machinery market toward workable competition. The *amici*, whose members have been intimately associated with the operation of the supplier market under the decree are in full agreement with this ultimate finding.

The district court, and apparently the government, conclude that the most illuminating facts respecting the effectiveness of the decree relate to the respective market shares of shoe machinery companies as gauged by current revenues (266 F. Supp. at 331, JS App. A 30, 31; Govt. br. 26). From the revenue calculations, the district court found that United's 1963 market share was approximately 62 percent. On first receiving the government's revenue exhibit, the court accurately observed that if it were the sole basis for determining market shares, it "... would be a very striking exhibit on behalf of United" (Tr. 552). Although revenue information as to United's competitors and the shoe machinery universe were not available in the main case, the extent of United's market position from almost any angle was approximately 85 percent (266 F. Supp. at 331, JS App. 29, 30). United was estimated to be supplying more than 75 percent, "... probably

85 percent'' of current market demand (110 F. Supp. at 339). In point of fact, this estimation probably *understates* United's pre-decree revenue position in the shoe machinery industry, since United's machines both then and now tend to be more complex and costly than those supplied by its competitors (e.g., D. Ex. 26, admitted Tr. 609, App. A, 14a, 15a).

Nevertheless, even accepting the conservative 85 percent figure as a fair measure of United's pre-decree shoe machinery revenue position, the decline to approximately 62 percent constitutes a striking demonstration of the erosive effect of the decree. In the words of the district court, this evidence establishes, ". . . a shrinkage of more than a quarter of the share of the market that it had in 1953'' (266 F. Supp. at 331, JS App. A 31). The government points to the fact that 62 percent is a large market share (Govt. br. 26), but this statement ignores the dramatic decline of nearly 25 percentage points[10] in the market occupancy, as indicated by these revenue data, enjoyed by United since the turn of the century that has been accomplished in barely 10 years. This development represents a startling disintegration of the hold United formerly had on the shoe machinery market, particularly in view of evidence which indicates that as much as 75 percent of United-made machines in shoe factories in 1963 were shipped prior to 1955 (D. Ex. 16, admitted Tr. 966). A snapshot of the current shoe machinery market is inconsistent with the concept of workable competition which places a high value on developments over time.[11]

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[10] If the relatively greater complexity and cost of United's machines are taken into account, the actual decline in revenue-based market share is probably in the range of 30 percentage points.

[11] See J. M. Clark, *Competition as a Dynamic Process*, preface, ix (1961).

Moreover, there is substantial basis for concluding that the revenue expressed market share of 62 percent, which includes revenues from machines placed on lease in prior years, substantially overstates the market position actually held by United. Shoe factory inventory information, of the sort which was crucial to the district court's 1953 decision (110 F. Supp. at 309), indicates an even more precipitate decline in United's market share since the decree. On the basis of a validly-projected 47-factory sample, the district court found that of the shoe machines in place in shoe factories as of 1963, approximately 54 percent were of United origin and that only about 47 percent had been purchased or leased directly from United (266 F. Supp. at 332, JS App. A 31, 32; D. Ex. 21, admitted Tr. 718). These figures correctly reflect the potency of the decree in actually and prospectively creating a vigorous and viable second hand shoe machinery market, since those United machines purchased from other sources constitute for the most part the present operation of that market, while machines purchased directly from United have passed from that firm's dominion and now constitute substantial potential competition. Therefore, we view the district court's finding that machines presently leased from United comprise only 17 percent of current shoe factory inventory as especially important. A principal objective of the decree was to loosen the leasehold ties between United and the shoe industry, and the reduction of the market share represented by United's leased machines from 85[12] to 17 percent is irrefutable evidence that this objective is being served.

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[12] As a result of United's pre-decree lease-only policy, virtually all United's machines were on lease prior to 1953.

A further significant indicator of the structure of the current market is the district court's finding that United's share of market represented by current (1963) shipments was approximately 51 percent, derived from a weighted average of market shares distributed among the "major" and "minor" categories used to determine market structure in the 1953 decision (110 F. Supp. at 304-306). While the district court fully appreciated the unreliability of these obsolete groupings for purposes of decree review (266 F. Supp. at 331, 333, JS App. A 30, 35, 36), as not revelatory of the numerous technological changes which have occurred in the past 10 years (266 F. Supp. at 331, JS App. A 30) whose stimulation was one of the root goals of the decree, the overall decline to 51 percent of current shipments dramatically describes the inroads presently being made by United's competitors.

In any event, the statistical evidence forming the basis for the district court's opinion and portraying all facets by which United's market share might be assessed demonstrates a decline from 85 to approximately 50 percent.[13] Thus, in the first 10 years of its operation, the decree has brought the shoe machinery industry to the brink of total elimination of what the present Assistant Attorney General has described as "undue

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[13] Although not attacking the district court's findings as clearly erroneous or otherwise improper, the government implicitly does so by introducing its highly questionable transposition of United's shoe factory inventory survey into the "major" and "minor" categories (Govt. br. 11). Apart from the fact that the district court rejected it as neither appropriate or necessary to the decision (266 F. Supp. at 331, JS App. A 30), this evidence is permeated with improper assumptions and exclusions. Trial brief for Amici at 18-23; Trial brief for Defendant at 5-14.

market power," [14] and to the stage where it has entered the spectrum of workable competition.

Market share evidence is, of course, responsive to only one standard by which the extent of competition in a market can be evaluated. Even an analysis of competitive conditions based on market structure theory alone necessitates consideration of other factors including trends as to the character of competitors, independence of action and ease of entry.[15]

The district court's findings as to these factors lend additional sustenance to its conclusion that the decree is effective. Thus, during the decree period, United's shoe machinery revenues declined from $32 million to $24 million while the gross revenues of its 12 most important domestic competitors almost doubled (266 F. Supp. at 331, JS App. A 31).

The record of new entry and growth of existing competitors similarly typifies a market which is steadily becoming more effectively competitive. As the district court found, "The pace of entry into the market in each three-year period after the decree increased: from 11 to 19 to 26, or a total of 56 companies" (266 F. Supp. at 332, JS App. A 33). Not only did the revenues of its 12 most important domestic competitors approximately double during the decree period to date, but that of its largest present competitor, International Shoe Machinery Corporation, more than tripled (Trial Brief for Defendant at 15, portraying in tabular form several of defendant's exhibits). The district court also found that a second hand market with 1963 sales of approxi-

[14] Kaysen and Turner, at 98.

[15] *Id.* at 71.

mately $3 million afforded United important competition to the degree that a shoe factory could start in business and fully satisfy its machinery needs, using many United machines, without buying or leasing a single machine from United (266 F. Supp. at 332 JS App. A 33).

A most significant indicator of the effectiveness of the decree in dissipating United's former market power and opening the shoe machinery industry to substantially more competition is the unanimous and representative testimony of shoe manufacturers on this subject. This testimony, in affidavit form, was admitted pursuant to stipulation as the direct testimony of the affiants (D. Ex. 24-44, admitted Tr. 609) and was relied upon by the district court (266 F. Supp. at 332, JS App. A 33, 34). Selected excerpts from these affidavits are reproduced as Appendix A to this brief (pp. 1a-13a, *infra*).

This evidence establishes that shoe manufacturers, who have daily observed the operation of the decree and the functioning of the shoe machinery market thereunder, uniformly conclude that in every major sector of shoe factory demand there is free competition permitting the selection of that machinery, regardless of source, which on the basis of merit is best suited to the appropriate shoe-making process. The following overall conclusions in this regard are typical:

> "There now exists in the shoe machinery market full and free competition allowing us as manufacturers to select our machinery as we wish on the merits of the machines available and in accordance with the processes we select to meet the various style changes which are constantly imposed on us

by the market" (Affidavit of Francis H. Gleason, App. A, p. 1a, D. Ex. 25, admitted Tr. 609).

"I am convinced that this market has changed radically from when I first entered the shoe industry. Neither we nor any shoe manufacturer are dependent upon United Shoe Machinery Corporation. There is plenty of competition in the shoe machinery business. Salesmen for competing concerns—both new and second hand—visit us and solicit our business constantly" (Affidavit of Milton Carmel, App. A, p. 5a, D. Ex. 32, admitted Tr. 609).

"The big change I have seen in the last ten years is the growth of new competition in shoe machinery, and the greater number of new types of machines which are offered, . . . I find ample competition among machinery manufacturers, and I am able to be flexible and selective in acquiring machinery" (Affidavit of Samuel Wolff, App. A, p. 8a, 9a, D. Ex. 37, admitted Tr. 609).

"There are also many more different types of machines now available than in 1955. In addition, there is a variety of European machinery available in this country, even for the welt process. It is hard to think of any particular United machine for which you cannot now obtain an adequate substitute" (Affidavit of T. R. Volenetz, App. A, p. 9a, 10a, D. Ex. 38, admitted Tr. 609).

In sum, this evidence, perhaps more than any other, portrays a continuing force in the market toward more competition, in accordance with the objectives of the decree.

These observations by persons who have most direct knowledge of conditions in the shoe machinery industry are supported by the analysis of defendant's witness Dr. Fox. Evaluating economic conditions in shoe

machinery manufacturing from a variety of perspectives and placing a premium on rates of entry, Dr. Fox concluded that the decree had exerted a significant influence in expanding the sources of machines available to shoe manufacturers and predicted that United would face even stronger competition in the future than at the end of 1964 (A. 66). *Amici* believe that this analysis substantially corroborates the judgment of shoe manufacturers that, since the decree, numerous and fully satisfactory alternative machinery offerings have become available on competitive terms.

On the basis of all the foregoing findings and evidence, it is the opinion of *amici* that the decree has been and is continuing to be an effective and satisfactory force toward creating substantially more competitive conditions in the shoe machinery industry in accordance with its intendment. The removal of pre-existing unlawful barriers to entry and competitive growth having been removed, United's market position has declined sharply and pre-existing and new competition has substantially enlarged the alternatives to shoe manufacturers in sectors where demand is greatest.

To be sure, United is the most important single factor in the shoe machinery industry. In fact, it is for this reason, among others, that *amici* urged the district court to retain the decree in its present form in order that it would fully exercise its effect. There are, however, reasons wholly unrelated to any substantive or remedial theory of monopolization why the decree has not produced a complete atomization of the shoe machinery industry. The growth of the shoe manufacturing industry during the past decade has been steady, but has in the aggregate not even kept pace with the increase

in national population (*Amici* Ex. 3, admitted Tr. 598). Since the district court's decision in the monopolization case, the number of shoe manufacturers declined from 1,492 to 785 (110 F. Supp. at 301; *Amici* Ex. 4, admitted Tr. 598) and the number of establishments has declined from 1,292 to 1,041 (*Amici* Ex. 4, admitted Tr. 598). Looming over this market, moreover, is the dramatic absorption of consumer demand by foreign competition and the increasing public acceptance of rubber-type footwear which has not historically been made in "conventional" shoe factories (*Amici* Ex. 1, 2, admitted Tr. 598). A market of this nature is not likely to generate enthusiastic entry or expansion across the whole spectrum of the supplier market.

As the district court found, United is without significant competition in certain sectors of the shoe machinery market (266 F. Supp. at 333, JS App. 35). The district court also found, however, that in virtually every one of these operations, the annual movement is less than 6 machines per year (*Id.*). Markets offering such limited shoe factory demand could hardly be expected to constitute a potent magnet to new competition (A. 47-48).

Finally, a massive alienation of machines formerly on lease from United has taken place since entry of the decree as shoe manufacturers exercised their option to purchase machines formerly on "Form A" lease. By February, 1964, 53,311 machines had been acquired by shoe manufacturers on such conversion purchases, of which fully 20,253 had been acquired during the first year of the decree (D. Ex. 23, admitted Tr. 846). The initial impact of this massive conversion was to instill in shoe manufacturers an ownership interest with

which they would be reluctant to part until their capital investment had been at least partially realized. It is fair to observe that conversion sales may have retarded the erosive impulse of the decree by three and possibly as much as five years.

On the other hand, *amici* see a sound basis for predicting that the decree, if allowed to continue in its present form, will have an even more salutary impact on the shoe machinery market than during the first decade of its operations. There has been a steady decline, noted by the district court, in the importance of "conventional" footwear made with machinery "where United offered over 90 percent of the machine types" (266 F. Supp. at 333, JS App. A 34). The proportion of shoes made by the McKay, Nail, Turn, Goodyear Welt, Stitchdown, Prewelt and Lockstitch processes declined from 55 percent of the leather and leather-type footwear market in 1950 to 42 percent in 1955 to 33 1/3 percent in 1963. (*Id.*). Simultaneously, shoe factory demand, as demonstrated by the testimony of shoe manufacturers (D. Ex. 24-44, Tr. 609) has been increasingly attached to simpler footwear constructions calling for machinery in sectors where United's market position is weakest. Excerpts of this testimony are reproduced as Appendix B to the brief. These excerpts describe some of the changes which are taking place in shoe manufacturing which have attracted substantial competition by companies other than United. They also portray imporant innovations in machinery for sole attaching, side lasting, toe lasting and other shoe factory operations which have been produced by United's competitors. In many instances these manufacturers have replaced or passed over United ma-

chinery in order to utilize competing machines. There is every reason to believe that these trends will continue to undermine United's market position so long as the decree continues to liberate the market from pre-existing unlawful barriers.

The government's emphasis on the absolute and relative size of United (Govt. br. 8, 27), in the opinion of *amici*, sheds no light on the effectiveness of the decree in dispersing the result of unlawful monopolization in the shoe machinery field. As the government recognizes, mere size is no offense. *United States* v. *Swift & Co.*, 286 U.S. 106, 116. Nor has the government pointed to any record evidence indicating that size in this case has been abused; rather, the government has virtually conceded United's compliance with the decree (Tr. 561, 562, 584).

In the same vein, the government's reliance on *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, is misplaced. Apart from the fact that standards under the Clayton Act are wholly different from Sherman Act standards, one of the factors which led to enactment of the Celler-Kefauver amendments, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964), *Procter & Gamble* arose on entirely different economic circumstances. The concern there was essentially twofold: (1) the elimination of the most likely potential competitor in a concentrated market; and (2) the possible elevation of entry barriers through intrusion by merger of a firm with a history of engaging in substantial advertising in a homogeneous product market already characterized by significant advertising-induced product differentiation, 386 U.S. 568, 579-581. We sub-

mit that unrelated legal principles and economic conditions cannot usefully be imported into this case.[16]

III. Imposing Structural Reorganization Through Dissolution or Divestiture Could Seriously Impair Economic Conditions in the Shoe Manufacturing Industry Without Promoting More Competition in the Shoe Machinery Industry.

While recognizing that the record affords no basis for exploring paths of divestiture[17] (Govt. br. 47, 48) the government claims that a presumptive case for surgical relief has been made (Govt. br. 48, 49, 50, n. 24) and undertakes "to 'tentatively suggest rather than specifically demand definite and precise remedies'" (Govt. br. 48). Of course, one of the principal reasons for *amici's* active participation in this proceeding is their awareness that from C Day forward, the ultimate objective of the government has been to effect a structural reorganization of United. The only record proposal by the government is its C Day petition to require the establishment of a full-line domestic shoe machinery firm out of the present assets of United. Evidently amending its theory, the government in this court for the first time "tentatively suggests" a variety of possibilities such as sale of unidentified shoe machinery assets to another company (presumably a stranger to the shoe machinery industry), establishment by United

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[16] This principle is demonstrated by the fact that a majority of the Federal Trade Commission are of the opinion that Procter applies to acquisitions in a market of the very nature the government would hope to establish by this proceeding. General Foods Corp., 3 Trade Reg. Rep. ¶17465 (FTC 1966).

[17] Consistent with sound judicial administration, the district court's pre-trial order required proof as to the need, or lack of need, for modification prior to committing its time to hearing detailed evidence on divestiture or dissolution programs.

of an independent shoe machinery company through transfer of assets and personnel, and spin-off of a foreign subsidiary. The government does not claim to have examined the probable consequences of any of these programs but has merely offered a glimpse of diverse possibilities.

Nevertheless, the relief sought by the government in this Court would irreversibly set in motion procedures whose natural and possibly inevitable outcome would be the ultimate dismemberment of United. As a consequence, whereas it would be clearly inappropriate to comment in detail on each of the broad programs tentatively suggested by the government, we believe it entirely appropriate, since the government has opened the subject, to express the concern of *amici* with the dangers inherent in surgical relief. We are aware that much of this analysis is in the nature of opinion and may be subject to the criticism that these are the sort of subjects which should be pursued on the basis of a complete record. Our suggested reasons for opposing divestiture are, however, submitted in the same spirit as the government's tentative suggestions as to approaches which might be explored.

We respectfully submit that the observations of *amici*, representing virtually all the shoe machinery customers of United, are entitled to some weight. The government itself concedes that divestiture should not be imposed at the cost of, "... working an undue hardship upon the American shoe manufacturing industry, which would be an important beneficiary of the effective functioning of the shoe machinery market" (Govt. br. 49). In like vien, the district court described the shoe industry as "among the chief intended beneficiaries of this Court's decree" (266 F. Supp. 335, JS App. A

38).[18] Concededly, the antitrust laws are designed to protect competition, not competitors or customers. *United States* v. *General Dynamics Corp.*, 258 F. Supp. 36, 66 (S.D.N.Y. 1966). Nevertheless, in this instance, against the backdrop of the government's proposed remedy, the enhancement of competition and of economic opportunities of customers is to a great degree synonymous.

At the threshold, it is the view of *amici* that surgical relief is unwarranted because the decree is operating to produce a smooth transition of the market toward effective competition (II, *supra*). The dispersal of unlawful market power and the ventilation of the market to new entries and successful growth of smaller firms are taking place. Inasmuch as the decree is having this effect, as was envisioned in 1953, there is no basis for taking the irreversible step involved in dissolution or divestiture. Contrary to the government's argument, we see no *prima facie* case for divestiture but rather see a presumption favoring the decree in its present form. There is no more basis now than there was ten years ago for hastily or imprudently ordering divestiture.

The government's original theory as to remedy, stated in its C Day petition, asked for the division of United into two full-line shoe machinery companies. This form of divestiture is essentially the same as sought by the government after trial of the main case, differing only in that the government then asked for the establishment of three such firms (110 F. Supp. at 348). Among

[18] See also Kaysen & Turner, at 80, n. 40 as to the attention to be awarded customers and others immediately affected by proposed plans of divestiture.

other reasons, the district court declined to grant the relief requested because of the impracticality presented by United's conduct of all its domestic shoe machinery manufacturing activities in a single plant at Beverly, Massachusetts (*Id.*). This condition persists today, and the same broad questions as to the practical transferability of assets and personnel and, more important, as to whether two viable companies could result from such a transfer are as pertinent today as they were a decade ago.

Professor Carl Kaysen has described some of the dangers involved in attempting division of the Beverly establishment. These included the practical impossibility of transferring United's factory assets and trained labor force, resulting in the likelihood of wasteful underutilization of capacity at one location and inadequacy of facilities elsewhere sufficient to constitute an independent competitive force.[19] There is certainly no guarantee that any individuals, seeing the split-up of the enterprise, could be induced to remain with either surviving firm. Professor Kaysen also observed that joint utilization of management, labor and research during any interim period, even if feasible, would hardly be calculated to create a climate conducive to independent competition for the future.[20] *Amici* foresee in any such sharp reorganization of United an equally sharp disruption in the stable flow of shoe machinery, a potential loss of innovation and a general decline in efficiency levels presently available.[21] These

[19] Kaysen, at 273.

[20] *Id.* at 273, 274.

[21] See Kaysen and Turner, at 80: "... the size of existing plants sets a lower limit to any dissolution proposal, even when they are bigger than the size needed to achieve minimum costs."

serious practical impediments to divestiture should not be masked by the suggestion that it would be any more feasible or efficient to "sell" United's assets (including personnel) to an independent company or to a subsidiary which is not engaged in the production of shoe machines. It would still be necessary to create a shoe machinery manufacturer out of whole cloth, regardless of the inter- or intra-corporate device to be utilized. In short, the wisdom of Solomon is no more required now than a decade ago to perceive the economic disadvantages of this remedy.

Even if the physical grounds for not requiring divestiture were absent, the *amici* believe that this form of relief would be disadvantageous for the shoe industry. United has historically provided the shoe industry with valuable research and development for innovation in shoe machinery and resulting improvement in technology in shoe manufacturing.[22] In making this statement, we recognize the inherent difficulties in quantifying appropriate measures of affective innovation, but to reiterate, we are only adverting to the problems we foresee should the government prevail on this appeal. In those sectors of the approximately 187 shoe factory operations (266 F. Supp. at 333, JS App. A 35) where demand has been most active in recent years, substantial benefits have accrued to the shoe industry from the research and development of other machinery manufacturers. These developments are illustrated by the testimony of shoe manufacturers set forth in Appendix B. At the same time, however, the nature of United's shoe machinery business permits it

[22] See Kaysen, at 150 as to scale of United's research activity at the time of the main case. See also 110 F. Supp. at 329, 332; 266 F. Supp. at 334, JS App. A 36.

to undertake research and development efforts over the entire spectrum of machinery demand and to apply its technological know-how to sectors which are not attractive, because of the paucity of transactions, to its competition.

United has already demonstrated a marked tendency to diversify into lines of endeavor unrelated to shoe machinery. During the decree period its annual revenues from the domestic sale and lease of shoe machinery declined from $32 million to $24 million while its corporate revenues increased to $208.7 million in 1964 (Govt. br. 9). Evidently the relatively low rate of return in the shoe machinery industry (266 F. Supp. at 334, JS App. A 37) and the relatively slow growth of the domestic shoe manufacturing industry have increasingly led United to look elsewhere. *Amici* are concerned that any form of divestiture would make the shoe machinery business less attractive, accelerate the trend toward other lines and significantly diminish the extent to which United would in the future invest in research and development dedicated to shoe machinery. The impact of such a development could be especially disadvantageous to the shoe industry which is a relatively unconcentrated (*Amici* Ex. 4, admitted Tr. 598), essentially small business industry (266 F. Supp. at 332, JS App. A 32).

The nature of the shoe machinery market also indicates that dismemberment could create diminished effective competition in the shoe machinery industry There is evidence indicating that competition between two or more companies competing across the full machinery line could severely impair and even destroy the competitive opportunities for progressive, limited line

companies (A. 70-71). The extent to which these firms have pioneered certain significant shoe machinery developments is borne out by the testimony of shoe manufacturers presented to the district court (App. B, *infra*, D. Ex. 24-44, admitted Tr. 609). The entry and growth of competing shoe machinery manufacturers in market sectors of greatest shoe factory demand have been among the most significant developments under the decree. The elimination of unlawful entry barriers has created a market condition whereby 56 companies have entered the shoe machinery industry during the period of the decree and the rate of entry has steadily increased (266 F. Supp. at 332, JS App. A 33). Similarly, pre-existing smaller competitors of United have flourished during the same period (266 F. Supp. at 331, JS App. A 31). The increase in numbers of competitors and the growth of small firms which have taken place in the shoe machinery industry in the face of the limited growth of the shoe manufacturing industry and the sluggish demand for numerous machine types reflect the truly unique present character of the shoe machinery industry. Shoe manufacturers have greatly benefitted by the substantial enlargement of "... multiple centers of activity, each following its unique pattern and developing its own esprit de corps to respond to the challenge of competition" (110 F. Supp. at 347). The proliferation and growth of small firms that have taken place under the decree are, moreover, exemplary of the desirable market condition which this Court has stated to be a central purpose of the antitrust laws. *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 275-277. The shoe industry and, we submit, competition generally, would be ill-served by the elimination of competitive opportunities for the many limited line companies.

Finally, fully one-third of machine types involve an annual demand of less than six machines per year (A. 47). As the district court observed, United's broad line permits it profitably to supply machines for which there is small annual demand (266 F. Supp. at 334, JS App. A 37). The shoe manufacturing industry is concerned that any dismemberment of United would jeopardize stability of supply in these markets and impair the leasing opportunity.

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed.

Respectfully submitted,

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